92-1783

Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

OCTOBER TERM, 1992

JOE ALTON HUGGINS, PETITIONER,

v.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a warrantless search of Petitioner's residence when neither the state statute nor the agency regulation purported to authorize the search places limits on the time or scope of searches or on the discretion of the state officials conducting searches violated the Fourth Amendment.

2. Whether the actions of the trial judge in interrogating Petitioner as to the source of his marijuana, asking Petitioner whether a government witness had lied, otherwise questioning Petitioner's testimony, stating to the jury that he considered Petitioner to have acted contemptuously, and stating to the jury that Petitioner had given false testimony in a portion of his testimony deprived Petitioner of a fair trial.

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The decision in this case upholding a warrantless search of Petitioner's residence when neither the state statute nor the agency regulation purported to authorize the search places limits on the time or scope of searches or on the discretion of the state officials conducting searches conflicts with the Fourth Amendment principles enunciated by this Court in New York v. Burger, United States v. Leon, Schneckloth v. Bustamonte, and Bumper v. North Carolina.....16

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IN THE SUPREME COURT OF THE
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JOE ALTON HUGGINS,

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v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Petitioner, JOE ALTON HUGGINS, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

CITATIONS TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit, which is not reported is affixed as Appendix A.

JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on February 5, 1993. Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

This case involves:

The Fourth Amendment to the United States Constitution which provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fifth Amendment to the United States Constitution which provides in pertinent part: "No person shall be ... deprived of life, liberty or property, without due process of law...."

Section 28-1-49, Code of Alabama, which provides:

"The [ABC] board shall have authority to promulgate rules and regulations not inconsistent with this chapter for carrying out the provisions of this chapter and to alter, repeal or amend such regulations. Such rules and regulations shall have the full force and effect of law."

Section 28-1-2, Code of Alabama which provides:

"No evidence obtained by means of an illegal search of the private dwelling of any person shall be admissible in any court in the prosecution of any person for violating the provisions of this title. A search is deemed illegal, unless a valid search warrant has been issued in full compliance with law, including section 28-4-255, and such warrant is executed according to law."

Regulation 20-X-6-.01 of the Alabama Alcoholic Beverage Control Board which provides:

"1. All persons, firms, organizations, clubs, corporations, or associations applying for renewal of license or applying initially for an ABC license of whatever type, by virtue of making such application and accepting such license, do agree, invite, consent, and authorize that agents of the Alabama ABC Board, as well as other commissioned law enforcement officers, either acting together or alone, of the State, or of the municipality and/or county in which the license establishment is operated, may at any time, enter search the

premises, observe the operations, and otherwise enforce the State laws, rules and regulations of the Alabama ABC Board in or on said premises and any building owned or occupied by the licensee in connection with, adjoining, or adjacent thereto, whether connected or not, and whether used by the licensee as a private dwelling or not, at any time.

"2. The premises of any licensee shall not be deemed to be the home or private premises of any member thereof and by applying for renewal license or applying for initial license and accepting such license, all the officers and members of such club do agree, consent, authorize, and accept this interpretation of the club premises and the invitation to and powers of search, supervision, observation, and enforcement indicated in Section 1, above.

"3. Where living quarters are maintained in the same structure in which an ABC licensed business is operated such living quarters are and shall be considered a part of the license premises and shall be subject to full inspection and supervision by the ABC Board as in any other part of the licensed premises.

"4. Such living quarters as above described shall not be deemed to be a home or private premises. All persons, firms, organizations, corporations, or associations holding, continuing to hold, renewing, or applying for such ABC license, consent and accept this interpretations of such premises as not being a home or private premises.

...

"6. The ABC licensee shall be held responsible for and accountable to the ABC Board for all criminal conduct which occurs on or is suffered to occur on any part of the ABC licensed premises. where the Board or Hearing Commission finds such criminal conduct to be allowed, caused, permitted, or suffered to occur by the licensee, such licensee's license shall be subject to suspension, revocation or other disciplinary action by the Board or Hearing Commission.

...

"8. Any ABC Board licensee violating a criminal law or statute of the State of Alabama involving moral turpitude shall subject his ABC Board license to suspension, revocation, or other disciplinary action by the Board or Hearing Commission.

STATEMENT OF THE CASE

A. Course of Proceedings

Petitioner, Joe Alton Huggins, was charged in a three count indictment in the United States District Court for the Middle District of Alabama. Count I charged that on August 29, 1991 he had distributed marijuana in Georgiana, Alabama in violation of 21 U.S.C. 841(a)(1). Count II charged that on October

17, 1991 he had possessed marijuana in Georgiana, Alabama with the intent to distribute it in violation of 21 U.S.C. 841(a)(1). Count III charged that on October 17, 1991 he had used and carried firearms in Georgiana, Alabama during a drug trafficking offense. (R1-1). Mr. Huggins was found guilty as charged in Count I, (R1-46), guilty of simple possession of marijuana in Count II, (R1-47), and not guilty in Count III. (R1-48). On July 10, 1992, Mr. Huggins was sentenced to a term of imprisonment of 16 months on Count I and 12 months on Count II, to be served concurrently with each other. He was placed on supervised release for a period of 5 years on Count I and 1 year on Count II to run concurrently. Mr. Huggins was also fined $10,000.00 including any costs of incarceration and supervision. (R1-57). Mr. Huggins filed timely notice of appeal. (R1-60). The United States Court of Appeals

for the Eleventh Circuit affirmed on February 5, 1993.

B. Material Facts

Joe Alton Huggins is a paraplegic.[1] (R3-182). He owned and operated a beer joint known as Hoss' Troft[sic] and Package off of Interstate 65 in Butler County, Alabama. (R2-46, R3-181). Mr. Huggins' residence adjoined the beer joint. (R2-12, 47).

Mr. Huggins was indicted initially by a Butler County, Alabama grand jury.[2] (R2-23). On October 17, 1991, Alabama Alcoholic Beverage Control ("ABC") Board Agent Jimmy Free went to Mr. Huggins' establishment to arrest him on that indictment. (R2-23). Agent Free saw Mr. Huggins in a pickup truck on the edge of the parking lot of Mr. Huggins' establishment. (R2-23, 33). Agent

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[1] Mr. Huggins was paralyzed as a result of a farming accident in 1979. (R3-182).

[2] The state charge was later dismissed in favor of a federal prosecution.

Free approached Mr. Huggins and arrested him at that spot. (R2-23, 34). Agent Free said he read Mr. Huggins his rights and asked him "if he would mind going and opening the place to where [they[3]] could do an inspection." (R2-24). Agent Free said that Mr. Huggins said "no problem." (R2-24-25). Agent Free denied telling Mr. Huggins that he did not need a search warrant. (R2-25, 34).

Agent Free related that Mr. Huggins then got himself out of his truck, got in his wheel chair and started rolling across some gravel. (R2-25). Agent Free said that because it was hard for Mr. Huggins to roll on the gravel, he pushed Mr. Huggins to the front door. (R2-25). Agent Free said that Mr. Huggins got his keys out, opened the front door, rolled inside and said "help yourself." (R2-25).

Mr. Huggins recalled Agent Free telling

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[3] More ABC agents accompanied Agent Free. (R2-24).

him to give him the keys so they could search his establishment. (R2-42-43). Mr. Huggins said that he asked Agent Free if he had a search warrant and that Agent Free said no. (R2-43). Mr. Huggins said he then asked what would happen if he did not give them the keys and was told that they would go in anyway. (R2-43). According to Mr. Huggins, they told him that they did not need a search warrant because they were ABC agents. (R2-44). Mr. Huggins said he told Agent Free he wanted to call his lawyer and that Agent Free said all right. (R2-43). Mr. Huggins said he then went around, unlocked the door and went inside. He said he then told them he wanted to make his phone call but they said no and directed him to stay put. (R2-43).

Agent Free and his confederates searched Mr. Huggins living quarters. In there, they found a number of guns. (R3-101-108, 129, 131, 188). They also found marijuana in a hot tub. (R3-143).

In response to Mr. Huggins' motion to suppress the evidence derived from the search, the government asserted that the search was a permissible administrative search pursuant to Alabama statutory law and regulations of the Alabama Alcoholic Beverage Control Board.

Section 28-1-49, Code of Alabama, provides:

> "The [ABC] board shall have authority to promulgate rules and regulations not inconsistent with this chapter for carrying out the provisions of this chapter and to alter, repeal or amend such regulations. Such rules and regulations shall have the full force and effect of law."

Regulation 20-X-6-.01 of the Alabama Alcoholic Beverage Control Board provides:

> "1. All persons, firms, organizations, clubs, corporations, or associations applying for renewal of license or applying initially for an ABC license of whatever type, by virtue of making such application and accepting such license, do agree, invite, consent, and authorize that agents of the Alabama ABC Board, as well as other commissioned law enforcement officers, either acting together or alone, of the State, or of the municipality and/or county in which the license establishment is operated,

may at any time, enter search the premises, observe the operations, and otherwise enforce the State laws, rules and regulations of the Alabama ABC Board in or on said premises and any building owned or occupied by the licensee in connection with, adjoining, or adjacent thereto, whether connected or not, and whether used by the licensee as a private dwelling or not, at any time.

"2. The premises of any licensee shall not be deemed to be the home or private premises of any member thereof and by applying for renewal license or applying for initial license and accepting such license, all the officers and members of such club do agree, consent, authorize, and accept this interpretation of the club premises and the invitation to and powers of search, supervision, observation, and enforcement indicated in Section 1, above.

"3. Where living quarters are maintained in the same structure in which an ABC licensed business is operated such living quarters are and shall be considered a part of the license premises and shall be subject to full inspection and supervision by the ABC Board as in any other part of the licensed premises.

"4. Such living quarters as above described shall not be deemed to be a home or private premises. All persons, firms, organizations, corporations, or associations holding, continuing to hold, renewing, or applying for such ABC license, consent and accept this interpretations of such premises as not being a home or private premises.

...

"6. The ABC licensee shall be held responsible for and accountable to the ABC Board for all criminal conduct which occurs on or is suffered to occur on any part of the ABC licensed premises. where the Board or Hearing Commission finds such criminal conduct to be allowed, caused, permitted, or suffered to occur by the licensee, such licensee's license shall be subject to suspension, revocation or other disciplinary action by the Board or Hearing Commission.

...

"8. Any ABC Board licensee violating a criminal law or statute of the State of Alabama involving moral turpitude shall subject his ABC Board license to suspension, revocation, or other disciplinary action by the Board or Hearing Commission.

(R1-27-12-14).

The government also asserted that Mr. Huggins had consented to the search. The government's argument on consent was two pronged. First, the government asserted that Mr. Huggins had consented to the search by way of a licensing agreement with the ABC Board. Second, the government argued that Mr. Huggins had just plain consented to the

search.

The licensing agreement provided:

> "The undersigned [Mr. Huggins] agrees, if a license is issued as hereinabove applied for, to comply at all times with and to fully observe all the provisions of the Alabama Alcoholic Beverage Control Act, as appears in Code of Alabama, Title 28, and all laws of the State of Alabama relative to the handling of alcoholic beverages. The undersigned, if issued a license as herein requested, further agrees to obey all rules and regulations promulgated by the Board relative to all alcoholic beverages received in this State. The undersigned, if issued a license as herein requested, also agrees to allow and hereby invites duly authorized agents of the Alabama alcoholic Beverage Control Board and any duly licensed commissiØoned law officer of the State, County, or Municipality in which the licensed premises are located to enter and search without a warrant the licensed premises or any building owned or occupied by him in connection with, adjoining, or adjacent thereto, whether connected or not, and whether used by him as a private dwelling or not, at any time."

(R1-25-8).

As a fall back position, the government asserted that the ABC agents had acted in "good faith."

The District Court's denial of Mr. Huggins' motion to suppress the evidence seized in the search was affirmed by the United States Court of Appeals for the Eleventh Circuit.

At trial, Mr. Huggins asserted as a defense that he had the marijuana for his own use and that he had the firearms for his own protection, hunting, and collecting purposes only. Mr. Huggins testified in his own defense. He testified that he smoked marijuana to relieve pain, vomiting and nausea associated with his paralytic condition.[4] (R3-183-184). He testified that he had guns around for hunting, collection, and protection purposes. (R3-192-194). During Mr. Huggins' testimony on direct examination, the trial judge interrogated Mr. Huggins as to the source of his marijuana.

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[4] Government witness Donna Long, of the Opelika (Alabama) Police Department, testified that she had heard of people using marijuana to relieve pain. (R3-80).

When Mr. Huggins refused to disclose his source, the trial judge threatened him with contempt. (R3-189, 203-208). The trial judge asked Mr. Huggins whether a prosecution witness who had given testimony contrary to Mr. Huggins' testimony had lied. The trial judge also questioned Mr. Huggins' testimony in other areas. Later, the trial judge told the jury of his opinion that Mr. Huggins had acted contemptuously and that Mr. Huggins had lied in a portion of his testimony regarding the source of his marijuana. (R4-218-219).

In his instructions to the jury, the trial judge stated:

> "In deciding whether you believe or do not believe any witness, I suggest you ask yourself a few questions. Did the person impress you as one who was telling the truth? Did he or she have any particular reason not to tell the truth? Did he or she have a personal interest in the outcome of the case? Did the witness seem to have a good memory? Did the witness have the opportunity and ability to observe those things about which he or she testified? Did he or she appear to understand the questions clearly and to answer them directly? Did the witness' testimony

differ from the testimony of any other witness?"

(R4-266-267).

REASONS FOR GRANTING THE WRIT

1. The decision in this case upholding a warrantless search of Petitioner's residence when neither the state statute nor the agency regulation purported to authorize the search places limits on the time or scope of searches or on the discretion of the state officials conducting searches conflicts with the Fourth Amendment principles enunciated by this Court in New York v. Burger, United States v. Leon, Schneckloth v. Bustamonte, and Bumper v. North Carolina.

In New York v. Burger, 482 U.S. 691, 702-703 (1987), this Court established that an warrantless administrative search of a pervasively regulated industry is valid if there is a substantial state interest behind the regulatory scheme, the search is necessary to further that scheme, and the authorizing statute is an adequate substitute for the warrant in giving notice to owners and limiting discretion of those conducting the search. Here, neither the authorizing statute nor the regulation involved places

limits on the time or scope of searches or on the discretion of the state officials conducting searches.

Section 28-1-49, Code of Alabama, provides:

> "The [ABC] board shall have authority to promulgate rules and regulations not inconsistent with this chapter for carrying out the provisions of this chapter and to alter, repeal or amend such regulations. Such rules and regulations shall have the full force and effect of law."

Regulation 20-X-6-.01 of the Alabama Alcoholic Beverage Control Board provides:

> "1. All persons, firms, organizations, clubs, corporations, or associations applying for renewal of license or applying initially for an ABC license of whatever type, by virtue of making such application and accepting such license, do agree, invite, consent, and authorize that agents of the Alabama ABC Board, as well as other commissioned law enforcement officers, either acting together or alone, of the State, or of the municipality and/or county in which the license establishment is operated, may at any time, enter search the premises, observe the operations, and otherwise enforce the State laws, rules and regulations of the Alabama ABC Board in or on said premises and any building owned or occupied by the licensee in connection with, adjoining, or adjacent thereto, whether connected or not, and

whether used by the licensee as a private dwelling or not, at any time.

"2. The premises of any licensee shall not be deemed to be the home or private premises of any member thereof and by applying for renewal license or applying for initial license and accepting such license, all the officers and members of such club do agree, consent, authorize, and accept this interpretation of the club premises and the invitation to and powers of search, supervision, observation, and enforcement indicated in Section 1, above.

"3. Where living quarters are maintained in the same structure in which an ABC licensed business is operated such living quarters are and shall be considered a part of the license premises and shall be subject to full inspection and supervision by the ABC Board as in any other part of the licensed premises.

"4. Such living quarters as above described shall not be deemed to be a home or private premises. All persons, firms, organizations, corporations, or associations holding, continuing to hold, renewing, or applying for such ABC license, consent and accept this interpretation of such premises as not being a home or private premises.

...

"6. The ABC licensee shall be held responsible for and accountable to the ABC Board for all criminal conduct which occurs on or is suffered to occur on any part of the ABC licensed premises.

> Where the Board or Hearing Commission finds such criminal conduct to be allowed, caused, permitted, or suffered to occur by the licensee, such licensee's license shall be subject to suspension, revocation or other disciplinary action by the Board or Hearing Commission.
>
> ...
>
> "8. Any ABC Board licensee violating a criminal law or statute of the State of Alabama involving moral turpitude shall subject his ABC Board license to suspension, revocation, or other disciplinary action by the Board or Hearing Commission.

(R1-27-12-14).[5] Because neither the statute nor the regulation place limits on the time or scope of searches by ABC agents and place

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[5] This regulation appears to conflict with Section 28-1-2, Code of Alabama which provides:

> "No evidence obtained by means of an illegal search of the private dwelling of any person shall be admissible in any court in the prosecution of any person for violating the provisions of this title. A search is deemed illegal, unless a valid search warrant has been issued in full compliance with law, including section 28-4-255, and such warrant is executed according to law."

no limits on the discretion of the state officials conducting searches they are not adequate substitutes for a warrant.

Petitioner recognizes that in Illinois v. Krull, 480 U.S. 340 (1987), this Court held that the "good faith" exception to the exclusionary rule applied when government agents relied upon a statute authorizing warrantless searches that is later declared unconstitutional. This Court stated: "Unless a statute is clearly unconstitutional, an officer cannot be expected to question the judgment of the legislature that passed the law." Conversely, if the statute is clearly unconstitutional, an officer cannot validly claim to have been acting in good faith. Cf. United States v. Leon, 468 U.S. 897, 915 (1984) ("Reviewing courts will not defer to a warrant based on an affidavit that does not provide the magistrate with a substantial basis for determining the existence of

probable cause."). As discussed hereinabove, the authorizing statute is constitutionally infirm. It gives the subject state agency the equivalent of a blank check. It does not even mention searches. Searches are mentioned a regulation promulgated by the very agency which conducted the search in this case. And, that regulation places no limits on the time or scope of searches and places no limits on the discretion of the state officials conducting searches. Thus, the "good faith" exception to the exclusionary rule should be of no avail the government.

The government also asserted below that Mr. Huggins had "consented" to the search. The government bore the burden of proving that any consent to the search was not the product of coercion. Schneckloth v. Bustamonte, 412 U.S. 218 (1973); Bumper v. North Carolina, 391 U.S. 543 (1968). To determine whether consent was given

voluntarily, a court must examine the totality of the circumstances surrounding the asserted consent. Schneckloth v. Bustamonte, 412 U.S. 218 (1973). Consent is not voluntary if given only in acquiescence to a claim of lawful authority. Bumper v. North Carolina, 391 U.S. 543 (1968).

The government's argument on consent was two pronged. First, the government asserted that Mr. Huggins had consented to the search by way of a licensing agreement with the ABC Board. Second, the government argued that Mr. Huggins had just plain consented to the search.

Petitioner acknowledges that in National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989)(hereinafter "National Treasury Employees Union"), this Court found valid implied consent to drug testing given as a condition of employment when employees sought to transfer to a new position. In that case, this Court noted that the drug

testing program was designed to minimize privacy intrusions. National Treasury Employees Union, 489 U.S. at 672, n. 2. Here, though, unlike the employment provisions before the Supreme Court in National Treasury Employees Union, the licensing agreement between Mr. Huggins and the ABC Board did nothing to minimize invasions of privacy. It contained no limits on the time or scope of searches by ABC agents and placed no limits on the discretion of the state officials conducting searches. (R1-1-25-8).

Here, there were differing accounts as to exactly who said and did what in connection with the search. However, it does appear that whatever acquiescence there may have been was intertwined with the subject authorizing statute and regulation. Thus, any consent was vitiated by the fact that it was intertwined with the existence of otherwise unconstitutional statute and regulation.

See, Serpas v. Schmidt, 827 F.2d 23, 29-30 (7th Cir. 1987)(no valid implied consent when government conditioned granting of licenses to race track employees on consent to unrestricted searches of on-track dormitory rooms); United States v. Leary, 846 F.2d 592 (10th Cir. 1988)(no valid implied consent to searches pursuant to participation in activities regulated and licensed by government or by adopting "open door policy" allowing government to come in and ask for any file or information without prior notice).

Further, a consensual search is limited to the terms of the authorization. See, Florida v. Jimeno, 500 U.S. ____, 111 S.Ct. 1801 (1991). Here, Agent Free said that he merely asked Mr. Huggins "if he would mind going and opening the place to where [they could do an inspection." (R3-24). Petitioner submits that the government did not sufficiently establish that Mr. Huggins consented to the

search of his residence adjoining the licensed premises.

Accordingly, Petitioner asserts that the search of his residence was violative of the Fourth Amendment to the United States Constitution. The decision below stands in conflict with the above cited principles of Fourth Amendment jurisprudence.

2. The decision below incorrectly rejected a claim of denial of a fair trial where the District Judge interrogated Petitioner as to the source of his marijuana, asked Petitioner whether a government witness had lied, otherwise questioned Petitioner's testimony, stated to the jury that he considered Petitioner to have acted contemptuously, and stated to the jury that Petitioner had given false testimony.

The Fifth Amendment to the Constitution of the United States provides that no person shall be deprived of liberty without due process of law. The due process guarantee of the Fifth Amendment to a fair trial includes the right to an impartial and disinterested tribunal. Marshall v. Jerrico, Inc., 446 U.S. 238 (1980).

Petitioner recognizes that a trial judge may quite properly question witnesses and comment on evidence when it appears necessary. See, United States v. Block, 755 F.2d 770, 775 (11th Cir. 1985); United States v. Harris, 720 F.2d 1259, 1260-61 (11th Cir. 1983); United States v. Bartlett, 633 F.2d 1184, 1188 (5th Cir.), cert. denied, 454 U.S. 820 (1981). For example, a trial judge may quite properly interrogate a witness to clarify his testimony, See, United States v. Block, 755 F.2d 770, 775 (11th Cir. 1985); Manchack v. S/S Overseas Progress, 524 F.2d 918, 919 (5th Cir. 1975), clarify ambiguities, correct misstatements, or obtain information needed to make rulings. See, United States v. Victoria, 837 F.2d 54 (2d Cir. 1989); United States v. Pisani, 773 F.2d 397, 403 (2d Cir. 1985). However, a trial judge must use caution to maintain an appearance of impartiality. See, United States v. Victoria, 837 F.2d 50, 54 (2d Cir.

1989); United States v. Vega, 589 F.2d 1147, 1153 (2d Cir. 1978). A trial judge must scrupulously avoid expressing or implying his or her own opinion on the merits of the case or the weight of particular evidence, lest the jury substitute the trial judge's opinion for its own. See, United States v. Sorondo, 845 F.2d 945, 949 (11th Cir. 1988); United States v. Cox, 664 F.2d 257, 259 (11th Cir. 1981). Questions designed to elucidate testimony must not "betray the trial court's belief as to the defendant's guilt or innocence." See, United States v. DiTommaso, 817 F.2d 201, 221 (2d Cir. 1987). See also, United States v. Victoria, 837 F.2d 50, 54 (2d Cir. 1989). A trial judge improperly injects himself into a trial by questioning witnesses when the attorneys are competently conducting their cases. See, United States v. Block, 755 F.2d 770, 775 (11th Cir. 1985); United States v. Welliver, 601 F.2d 203, 208-209 (5th Cir. 1979); United States v.

Daniels, 572 F.2d 535, 4541 (5th Cir. 1978). "Where a defendant takes the stand in his own behalf, any unnecessary comments by the court are too likely to have a detrimental effect on the jury's ability to decide the case impartially....This is especially true where the judge's remarks are directed to the defendant." See, United States v. Middlebrooks, 618 F.2d 273, 277 (5th Cir.)., cert. denied, 449 U.S. 984 (1980). While it is unquestionably proper for the government to seek to impeach a defendant's testimony, this is not a proper function of the trial judge for he must at all times maintain the appearance of impartiality and detachment. See, United States v. Mazzilli, 848 F.2d 384, 388 (2d Cir. 1988). In this case, the trial judge's questioning of Mr. Huggins and his actions in relation thereto were in the nature a cross examination of Mr. Huggins and a challenge to Mr. Huggins' credibility.

At trial, Mr. Huggins asserted as a defense that he had the marijuana only of his own use and that he had the firearms for his own protection, hunting, and collecting purposes only. He testified that he smoked marijuana to relieve pain, vomiting and nausea associated with his paralytic condition. (R3-183-184). He testified that he had guns around for hunting, collection, and protection purposes. (R3-192-194). During Mr. Huggins' testimony on direct examination, the trial judge interrogated Mr. Huggins as to the source of his marijuana. When Mr. Huggins refused to disclose his source, the trial judge threatened him with contempt. (R3-189, 203-208). The trial judge also asked Mr. Huggins whether a prosecution witness who had given testimony contrary to Mr. Huggins' testimony had lied. The trial judge also questioned Mr. Huggins' testimony in other areas. Later, the trial judge told the jury of his opinion that Mr.

Huggins had acted contemptuously and that Mr. Huggins had lied in a portion of his testimony concerning the source of his marijuana. (R4-218-219).

The source of Mr. Huggins' marijuana was not an issue in the case -- at least until the trial judge made it one. Moreover,

> "[b]ecause 'determination of credibility are for the jury, ... not for witnesses,' [...] '[prosecutorial cross-examination which compels a defendant to state that law enforcement officers lied in their testimony is improper.' United States v. Richter, 826 F.2d 206, 208 (2d Cir. 1987)(citations omitted). It is every bit as improper, and probably more so, for a trial judge to require a witness, especially a defendant, to characterize the testimony of a government agent as right or wrong."

United States v. Victoria, 837 F.2d at 55. The trial judge did not even wait for the prosecutor to begin cross examination to begin his own interrogation of Mr. Huggins. The trial judge's interrogation of Mr. Huggins did not clarify or elucidate anything, did not correct any misstatement, and did not develop any information necessary

to make any ruling. It did inject extraneous issues into the case and challenge Mr. Huggins' credibility. These questions and comments were "so prejudicial that even the strongest instructions to disregard the judge's questions or comments [would not have] suffice[d]." See, United States v. Carpenter, 776 F.2d 1291, 1296 (5th Cir. 1985). In any event, the matter was exacerbated by the trial judge's stating in front of the jury that Mr. Huggins had acted contemptuously. Cf. Sacher v. United States, 343 U.S. 1, 10 (1952)(F.R.Cr.P. 42 permits the judge to defer proceedings for direct contempt until the end of the trial if remedial actions would prejudice the parties on trial or interfere with the orderly conduct of the proceedings.) This matter was brought into play further through what otherwise would have been a routine jury instruction. In his instructions to the jury, the trial judge stated:

> "In deciding whether you believe or do not believe any witness, I suggest you ask yourself a few questions. Did the person impress you as one who was telling the truth? Did she or she have any particular reason not to tell the truth? Did he or she have a personal interest in the outcome of the case? Did the witness seem to have a good memory? Did the witness have the opportunity and ability to observe those things about which he or she testified? Did he or she appear to understand the questions clearly and to answer them directly? Did the witness' testimony differ from the testimony of any other witness?

(R4-266-267). These instructions served only the remind the jury to consider the previous exchange and comments concerning with Mr. Huggins.

The trial judge's actions in these regards deprived Petitioner of a fair trial. The decision below thus conflicts with the requirement of the due process clause of the Fifth Amendment to the United States Constitution.

CONCLUSION

For the foregoing reasons, Petitioner Joe Alton Huggins submits that the petition for writ of certiorari should be granted.

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 92-6624
Non-Argument Calendar

D. C. Docket No. CR-92-75-N

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOE ALTON HUGGINS,

Defendant-Appellant.

Appeal from the United States
District Court
for the Middle District of Alabama

(Febuary 5, 1993)

Before TJOFLAT, Cheif Judge, BLACK, Circuit Judge, and JOHNSON, Senior Circuit Judge.

PER CURIAM:

A federal grand jury indicted the defendant/appellant, Joe Alton Huggins, in count I with distribution of marijuana in violation of 21 U.S.C.A. [Section] 841(a)(1). Count II charged the defendant with possession with intent to distirbute marijuana, also in violation of 18 U.S.C.A. [Section] 841(a)(1). Count III charged the defendant with the use of firearms during a drug trafficking crime in violation of 18 U.S.C.A. [Section] 924(c)(1). The jury found the defendant guilty on Count I. He was found guilty of the lesser included offense of simple possession in Count II, and not guilty on Count III.

The two issues presented on this appeal are:

1. Whether the district court abused its discretion by questioning the defendant during trial, thereby denying the defendant a fair trial; and

2. Whether the district court's ruling upholding the search of the defendant's business under the general authority of the Alabama Alcohol Beverage Control Board and the contractual agreement between the parties was clearly erroneous.

The record in this case clearly reflects that there is no merit in either issue presented.

We AFFIRM.